

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DELAWARE BAY SURGICAL
SERVICES, P.A., a Delaware
professional services corporation,

Defendant Below-
Appellant,

v.

PATRICK SWIER, M.D.,

Plaintiff Below-
Appellee.

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§ No. 570, 2004

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§ Court Below—Superior Court

§ of the State of Delaware,

§ in and for Sussex County

§ C.A. No. 03C-03-030

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Submitted: January 25, 2005

Decided: February 15, 2005

Before **STEELE**, Chief Justice, **HOLLAND**, and **BERGER**, Justices.

ORDER

This 15th day of February 2005, upon consideration of the appellee’s “Motion for Notice to Show Cause,” which the Court has deemed to be a motion to dismiss, and the appellant's response thereto, it appears to the Court that:

(1) The appellant, Delaware Bay Surgical Services (Delaware Bay), filed this appeal from a post-trial decision of the Superior Court, dated November 30, 2004, which awarded damages to the appellee, Patrick Swier, M.D., under the Delaware Wage Act. The Superior Court also awarded Swier

attorneys fees with “[t]he reasonableness [of the fees] to be determined upon the filing of [Swier’s] counsel’s affidavit.”

(2) Swier has filed a motion to dismiss this appeal on the ground that the Superior Court’s November 30, 2004 order is interlocutory and that Delaware Bay has not complied with Supreme Court Rule 42, which governs appeals from interlocutory orders. Swier contends that, until the Superior Court determines the specific amount of the fee award, the November 30, 2004 order is not final or appealable. Delaware Bay, on the other hand, contends that Swier’s counsel failed to file his affidavit in support of his fee claim within 30 days of the Superior Court’s judgment. Delaware Bay contends that this case is distinguishable from the cases relied on by Swier because there was no fee application pending before the Superior Court at the time Delaware Bay filed its notice of appeal, which was filed on the last day of the 30-day limitations period.

(3) Upon consideration of the parties’ respective positions, we conclude that this appeal is interlocutory. The Superior Court’s order clearly awarded attorneys fees to Swier’s counsel “in an amount to be determined.” The Superior Court’s order did not set a deadline for Swier’s counsel to file his fee affidavit. Accordingly, we reject Delaware Bay’s contention that Swier’s

counsel was required to file his affidavit within 30 days of the Superior Court's interlocutory judgment. Contrary to Delaware Bay's contention, the interlocutory judgment did not become final simply because 30 days had expired without the filing of the fee affidavit.

(4) This Court consistently has held that that a judgment on the merits is not final until an outstanding related application for an award of attorneys fees has been decided.¹ In this case, attorneys fees were awarded as part of the November 30th judgment. The Superior Court, however, has yet to determine the appropriate amount of the award. The further action required by the Superior Court in this matter is not a purely ministerial act but an exercise of discretion by the court in fashioning an appropriate implementing order. The ruling from which the appeal is taken is interlocutory in nature because it did not finally determine and terminate the cause before the Superior Court.² Furthermore, Delaware Bay has failed to comply with the requirements of Rule 42 in seeking to appeal from an interlocutory order.

NOW, THEREFORE, IT IS ORDERED that Swier's motion to dismiss is GRANTED. Delaware Bay's filing fee paid in conjunction with this appeal

¹ *Lipson v. Lipson*, 799 A.2d 345, 348 (Del. 2001).

² *See Julian v. State*, 440 A.2d 990 (Del. 1982).

shall be transferred to any later appeal from a final judgment entered by the Superior Court in this matter. This appeal is hereby DISMISSED.

BY THE COURT:

/s/ Randy J. Holland
Justice